Silverstone Bhd v Menteri Sumber Manusia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–111 OF 2000
RAUS SHARIF J
9 NOVEMBER 2004

Labour Law — Trade union — Recognition — Application for — Whether employees to be represented by union was already represented by an existing union — Whether union was competent to represent employees — Whether recognition should be granted — Industrial Relations Act 1967 s 9

The second respondent, a trade union, submitted a claim for recognition under s 9 of the Industrial Relations Act 1967 ('the Act') in respect of employees of the applicant company engaged in the executive and supervisory categories except for the post of manager, assistant manager, confidential or security. On the request of the applicant, a membership check of the relevant employees of the applicant was conducted. Pursuant to the membership check, it was noted that 55.96% of the employees within the scope of representation of the second respondent were members of the second respondent as at 25 January 1999. The applicant was advised to accord recognition to the second respondent.

The applicant declined to accord recognition and requested the Director General of Industrial Relations ('DGIR') to review the matter. The applicant claimed that at the material time the employees in the supervisor category were eligible to be members of the National Union of Employee in Companies Manufacturing Rubber Products ('the National Union'). The matter was referred to Minister of Human Resources ('the minister'). The minister subsequently directed the applicant to accord recognition on the second respondent. Hence, this application by the applicant company for an order of certiorari to quash the decision of the minister on the grounds *inter alia* that the minister erred in law: (1) in failing to take into consideration the omission of the DGIR to undertake further investigation under s 9(4B)(b) of the Act in light of the existence of the National Union which could also represent employees in the supervisory category; and (2) he failed to appreciate that the recognition claim was defective in light of the inclusion of the employees in the executive category for the purposes of determining the percentage of the employees' membership in the Union and the inclusion of this executive category was in breach of s9(1) of the Act.

Held, dismissing the application with costs:

(1) There was no dispute that the National Union was accorded recognition by the applicant as of 1992 but the scope of representation of the National Union, as admitted by the applicant, was 'in respect of all employees employed by the applicant, except for those in the managerial, executive, confidential or securities capacities'. Clearly the applicant's executives

were not within the second respondent's scope of representation (see para 10).

(2) In any event the applicant had not adduced any evidence to substantiate its claim that the supervisors were members of the National Union. In fact the supervisors could not be members of the National Union as the National Union members were made up of non-supervisory members and was prohibited from seeking representation of employees in managerial, executive, confidential or security capacity (see para 12).

(3) The second respondent did not contravene s 9(1) of the Act as it was clear from the minister's decision on 25 July 1996 that supervisors had been recognised as belonging to the managerial, executive, confidential or security capacity. This had not been disputed by the applicant (see para 15).

(4) A trade union must satisfy two requirements before it could be accorded with recognition. Firstly, it must satisfy the requirement that it is competent to represent the employees of a particular industry under its membership rules and there must be similarity in trade, industry and profession between the trade union and the company. Secondly, it must have sufficient members to represent the employees. On the facts of this case, the second respondent had fulfilled both requirements (see para 17).

[**Bahasa Malaysia summary**

Responden kedua membuat tuntutan untuk pengiktirafan di bawah s 9 Akta Perhubungan Perusahaan 1967 ('Akta tersebut') berkaitan dengan pekerja pemohon yang terlibat dalam kategori eksekutif dan penyeliaan tetapi tidak termasuk pekerja jawatan pengurus, pembantu pengurus atau sekuriti. Berikutan permintaan pemohon, satu semakan keahlian untuk pekerja-pekerja berkaitan telah dilaksanakan. Mengikut semakan keahlian tersebut, 55.96% daripada pekerja di dalam skop representasi responden kedua merupakan ahli responden kedua pada tarikh 25 Januari 1999. Pemohon diminta memberi pengiktirafan kepada responden kedua. Pemohon melalui suratnya kepada Ketua Pengarah Perhubungan Perusahaan ('DGIR') tidak mahu memberi pengiktirafan kepada responden kedua dan meminta DGIR menimbang semula perkara tersebut. Pemohon mengatakan pada masa matan pekerja didalam kategori jawatan penyeliaan boleh menjadi ahli National Union of Employee in Companies Manufacturing Rubber Products ('Kesatuan Nasional'). Perkara tersebut dirujuk kepada Menteri Sumber Manusia ('menteri tersebut'). Menteri tersebut telah memberi arahan supaya pengiktirafan diberi oleh pemohon kepada responden kedua. Justeru itu, permohonan oleh syarikat tersebut untuk perintah certiorari untuk membatalkan keputusan menteri tersebut atas alasan, antara lain, menteri tersebut melakukan kesalahan dari segi undang-undang kerana: (1) gagal menimbangkan kelalaian DGIR yang

tidak melakukan penyiasatan lanjut di bawah s 9(4B)(b) Akta tersebut kerana terdapat Kesatuan Nasional yang juga boleh mewakili pekerja dalam kategori penyeliaan; dan (2) apabila dia gagal mempertimbangkan bahawa tuntutan pengiktirafan tersebut tidak sempurna kerana penggolongan pekerja di dalam kategori eksekutif dalam menentukan bilangan dalam peratus keahlian pekerja di dalam Kesatuan dan pengambilan kira kategori eksekutif ini melanggar s9(1) Akta tersebut.

Diputuskan, menolak permohonan dengan kos:

(1) Tidak dipertikaikan bahawa Kesatuan Nasional telah diberi pengiktirafan oleh pemohon semenjak tahun 1992 tetapi skop bagi representasi Kesatuan Nasional, seperti yang diakui oleh pemohon, adalah 'in respect of all employees employed by the applicant, except for those in the managerial, executive, confidential or securities capacities'. Adalah jelas bahawa pekerja eksekutif pemohon tidak tergolong di dalam skop representasi responden kedua (lihat perenggan 10).

(2) Malahan pemohon tidak mengemukakan apa-apa bukti untuk mengukuhkan tuntutannya bahawa pekerja dalam kategori penyeliaan tersebut merupakan ahli Kesatuan Nasional. Pekerja dalam kategori penyeliaan tidak boleh menjadi ahli Kesatuan Nasional kerana ahli Kesatuan Nasional terdiri daripada pekerja dalam kategori bukan penyeliaan dan dilarang mencari representasi pekerja yang berada di dalam golongan pengurusan, eksekutif, confidential atau sekuriti (lihat perenggan 12).

(3) Responden yang kedua tidak menyanggah s 9(1) Akta tersebut kerana adalah jelas daripada keputusan menteri tersebut pada 25 Julai 1996 bahawa pekerja dalam kategori penyeliaan telah diiktirafkan sebagai pekerja di dalam kategori pengurusan, eksekutif, confidential atau sekuriti. Ini tidak dipertikaikan oleh pemohon (lihat perenggan 15).

(4) Sebuah persatuan pekerja perlu memuaskan dua peruntukan sebelum ia boleh diberi pengiktirafan. Pertama, ia perlu memuaskan peruntukan yang ia layak untuk mewakili pekerja daripada sesebuah industri di bawah peraturan keahliannya dan juga perlu ada persamaan di dalam perniagaan, industri dan profesion di antara persatuan pekerja tersebut dan syarikat. Kedua, ia mesti mempunyai keahlian yang mencukupi untuk mewakili pekerja-pekerja tersebut. Berdasarkan fakta-fakta kes ini, responden kedua telah memuaskan kedua-dua peruntukan tersebut (lihat perenggan 17).]

Notes

For cases on recognition of trade unions, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1502–1520.

Legislation referred to

Industrial Relations Act 1967 ss 9, (1), (4B)(b), (5)

N Sivabalah (Raymond TC Low with him) (Shearn Delamore & Co) for the applicant.
Hasilah Awang (Senior Federal Counsel) for the first respondent.
S Muhendran (Mehala with him) (Muhendran Sri) for the second respondent.

Raus Sharif J:

APPLICATION

[1] This is an application by Silverstone Bhd (the applicant), a company engaged in the manufacture of tyre product for an order of certiorari to quash the decision of the Minister of Human Resources (the Minister) made under s 9 of the Industrial Relation Act 1967 (the Act). The Minister made his decision on 20 September 2000 whereby he directed the applicant to accord recognition to Kesatuan Kakitangan Eksekutif dan Penyelia Silverstone Bhd (the second respondent) in respect of employees engaged in the executive and supervisor categories, except those holding the post of manager, assistant manager, confidential or security.

FACTS

[2] The facts leading to this application are these. On 25 January 1999, the second respondent submitted a claim for recognition under s 9 of the Act in respect of employees of the applicant engaged in the executive and supervisory categories except for the post of manager, assistant manager confidential or security. The applicant, in accordance with the provision of Part III of the Act, requested for a membership check to determine the eligibility of the second respondent to represent the employees within the scope of the recognition sought. For the purposes of conducting the membership check, the applicant provided the Director General of Industrial Relations (DGIR) with a list of all the employees of the applicant engaged in the executive and supervisor categories as at 25 January 1999. From the list a total of 133 employees were employed as the executive and supervisor categories and of the 133 employees, 47 of them were employed in the executive category.

[3] The Director General of Trade Union's (DGTU) officers conducted the membership check on 20 December 1999. By a letter dated 31 January 2000, from the Industrial Relation Department, the applicant was informed that pursuant to the membership check, 55.96% of the employees within the scope of representation of the second respondent were members of the second respondent as at 25 January 1999. The applicant was advised to accord recognition to the second respondent.

[4] The applicant, by its letter dated 4 May 2000 to the DGIR declined to accord recognition to the second respondent and requested the DGIR to review the matter for the reason stated therein. One of the objection raised by the applicant at the material time was that the employees in the supervisor category were eligible to be members of the National Union of Employee in Companies Manufacturing Rubber Products (the National Union).

[5] The matter was referred to the Minister. By a letter dated 30 September 2000 from the Industrial Relation Department, the applicant was informed that the Minister had directed under s 9(5) of the Act, that recognition be accorded by the applicant on the second respondent. Hence, this application.

GROUNDS OF APPLICATION

[6] The applicant forwarded three grounds to substantiate its application to quash the decision of the Minister. But at the hearing the applicant relied only on two grounds namely:

(1) The Minister erred in law in failing to take into consideration the omission of the DGIR to undertakes further investigation under s 9(4B)(b) of the Act in light of the existence of the National Union which could also represent employees in the supervisory category.

(2) The Minister erred in law hen he failed to appreciate that the recognition claim was defective in light of the inclusion of the employees in the executive category for the purposes of determining the percentage of the employees' membership in the Union and the inclusion of this executive category was in breach of s 9(1) of the Act, The Minister had therefore acted *ultra vires* s 9(1) of the Act.

FIRST GROUND

The minister erred in law in failing to take into consideration the omission of the DGIR to undertakes further investigation under s 9(4B) (b) of the Act in light of the existence of the National Union which could also represent employees in the supervisory category.

[7] Briefly the applicant's contention is that the second respondent is not competent to represent the applicant's workmen belonging to the supervisor category. The applicant is of the view that the Supervisors are members of the National Union which was accorded recognition in 1992. Hence, the Minister should not have directed the applicant to accord recognition to the second respondent. A further contention by the applicant is that the DGIR failed to investigate the issue concerning the second respondent's competency and the Minister failed to consider the DGIR's inactions before directing the applicant to accord recognition.

[8] The issue here is s 9 of the Act. For ease of reference the relevant provisions of s 9 are hereby produced:

Claim for recognition

9(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say:

(a) managerial capacity;

(b) executive capacity;

(c) confidential capacity; or

(d) security capacity,

may seek recognition or serve an invitation under s 13 in respect of workmen employed in any of the abovementioned capacities.

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.

(2) A trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim:

(a) accord recognition; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds of not according recognition; or

(c) apply to the Director General to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union of workmen concerned and give a written notice of such application to such trade union of workmen.

(4) Where the trade union of workmen concerned receives a notification under paragraph (3)(b), or where the employer or trade union of employers concerned fails to comply with subsection (3), the trade union of workmen may report the matter to the Director General.

(4A) The Director General, upon receipt of a reference under subsection (1A), or an application under paragraph (3)(c), or a report under subsection (4) may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(4B) For the purpose of carrying out his functions under subsection (4A) the Director General:

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant; and

(b) may refer to the Director General of Trade Union for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Union under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.

(4C) Where the matter is not resolved under subsection (4A) the Director General shall notify the Minister.

(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify; a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity.

[9] The question is, has s 9 of the Act been complied with? My answer is yes. In this case the second respondent's claim for recognition was submitted on the application on 25 January 1999. The applicant refused to accord recognition. Hence the second respondent reported in writing to the DGIR. The DGIR then requested for the list of applicant's supervisors and executives and referred to DGTU for membership check to determine the competency of the second respondent to represent the supervisors and executives. As the result of the membership check, 55.96% of the applicant's supervisors and the executives were members of the second respondent and fall within the scope of the second respondent. Thus, the applicant was advised by the DGIR to accord recognition. But the applicant refused to accord recognition and the minister was notified of the refusal. The minister under the power vested in him under s 9(5), after considering the matter before him directed the applicant to accord recognition on the second respondent beginning 25 January 1999.

[10] From the above facts, the issue of non-compliance of s 9 and in particular s 9(4B)(b) does not arise as membership check exercise was carries out by the DGTU to determine the competency of the second respondent to represent the executive and the supervisors. It was contended by the applicant that the applicant's supervisors are members of the National Union and as such the second respondent should not be accorded recognition to represent the supervisors. There is no dispute that the National Union was accorded recognition by the applicant as of 1992 but the scope of representation of the National Union, as admitted by the applicant, is 'in respect of all employees employed by the applicant, except for those in the managerial, executive, confidential or securities capacities'. Clearly the applicant's executives are not within the second respondent scope of the representation. The question is do supervisors fall within the National Union's scope of representation?

[11] This issue also formed a source of an earlier dispute between the applicant and the National Union. The applicant had questioned the National Union's competency to represent the supervisors and attempted to restrict the supervisors from the National Union's scope of representation. The matter was also referred to the minister to be resolved. The minister by his decision dated 25 July 1996, held that the supervisors belong to the category of managers, executives, confidential staff or security staff and thus, not within the National Union scope of representation. Clearly there is a contradiction in the applicant's stand on this matter.

[12] In any event the applicant has not adduced any evidence to substantiate its claim that the supervisors are members of the National Union. In fact the supervisors cannot be members of the National Union as the National Union members are made up of non-supervisory members and is prohibited from seeking representation of employees in managerial, executive, confidential or security capacity.

[13] Thus, I find no merit on the applicant's first ground.

SECOND GROUND

The honourable minister erred in law when he failed to appreciate that the recognition claim was defective in light of the inclusion of the employees in the executive category for the purposes of determining the percentage of the employees' membership in the Union and that the inclusion of this executive category was in breach of s 9(1) of the Act. The minister had therefore acted ultra vires s 9(1) of the Act.

[14] The applicant contended that the claim for recognition is fundamentally defective on the premise that the second respondent is seeking recognition to represent employees engaged in the supervisory and executive category at the same time under a common claim for recognition. This according to the applicant is a breach of s 9(1) of the Act.

[15] To me, contrary to the applicant's contention, the second respondent did not contravene s 9(1) of the Act as it is clear from the minister's decision on 25 July 1996 that supervisors have been recognised as belonging to the managerial, executive, confidential or security capacity. This has not been disputed by the applicant. To me, the applicant's stand on this issue is contradictory and not *bona fide* as:

(a) the applicant in recognising the National Union in 1992 sought to reverse the supervisors from the National Union's scope of representation when the matter was referred to the minister the issue was decided in the applicant's favour wherein the supervisors were classified in the same category or managers, executive, confidential staff and security staff.

(b) At the present stage, the applicant seek to remove the supervisors from the second respondent's scope of representation by claiming that the supervisors should be represented by the National Union and alleged that the minister has contravened s 9(1) of the Act in recognising the second respondent as a competent union to represent both the supervisors and executives.

[16] Thus, I also find no merit in the applicant's second ground.

CONCLUSION

[17] In conclusion, it is worthwhile to note that a trade union must satisfy two requirements before it could be accorded with recognition. Firstly, it must satisfy the requirement that it is competent to represent the employees of a particular industry under its membership rules and there must be similarly in trade, industry and profession between the trade union and the company. Secondly, it must have sufficient members to represent the employees. On the facts of this case, the second respondent, has fulfilled both requirements. The applicant has failed to prove otherwise.

[18] In the circumstances, the applicant's application is dismissed with costs.

Application dismissed.

Reported by K Krishnan